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No. 99-1880

Supreme Court, U.S.
FILED
JUN 21 2000
CLERK

In The

Supreme Court of the United States

GRAEME FREEMAN, et al.,

Petitioners,

v.

BURLINGTON BROADCASTERS, INC.,
d/b/a WIZN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question presented by the Petitioners in the Petition ("Pet.") at i is overly broad, inartfully phrased and not faithful to the proceedings below. The precise question presented for review in this case is:

> Does federal law preempt state and local jurisdiction over radio frequency interference ("RFI")?

CORPORATE DISCLOSURE STATEMENT OF BURLINGTON BROADCASTERS, INC. D/B/A WIZN

Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, Respondent Burlington Broadcasters, Inc. d/b/a WIZN ("WIZN") hereby represents that it has not issued shares to the public nor does it have any parent corporation(s).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI 1

A. There Is No Compelling Reason For The Court To Grant The Writ 1

I. THE CASES CONCERNING THE FCC'S EXCLUSIVE JURISDICTION OVER RFI ARE NOT IN CONFLICT 2

A. United States Court of Appeals 2

B. United States District Courts 3

C. State Courts 4

D. Federal Communications Commission 5

II. THIS CASE DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT 7

A. This Case Is In Accord With This Court's Standards For Preemption 7

1. Field Preemption Of RFI Is Total And Includes Business Equipment 8

2. The Cases Confirm That Federal Preemption Of RFI Extends To Business And Institutional Equipment 10

B. The Tenth Amendment Does Not Bar Field Preemption 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Blackburn v. Doubleday Broadcasting Co., 353 N.W.2d 550 (Minn. 1984) 4

Broyde v. Gotham Tower, Inc., 13 F.3d 994 (6th Cir. 1994), *cert. denied*, 511 U.S. 1128 (1994).....3, 6

Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984)..... 6

Cippolone v. Liggett Group, Inc., 505 U.S. 504 (1992) 7

City of New York v. FCC, 486 U.S. 57 (1988) 7

Crosby v. National Foreign Trade Council, No. 99-474, 2000 WL 775550 (U.S. June 19, 2000) ...12, 13

Fetterman v. Green, 455 Pa.Super. 639, 689 A.2d 289, *appeal denied*, 695 A.2d 786 (June 17, 1997) 5

Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982) 13

Goforth v. Smith, 991 S.W.2d 579 (Ark. 1999)..... 5

Graeme Freeman, et al. v. Burlington Broadcasters, Inc. d/b/a WIZN, et al., 204 F.3d 311 (2d Cir. 2000) 3

Great Lakes Wireless Talking Machine Company d/b/a WZSH 95 FM v. David Hayes, et al., CIV-91-6140T (W.D.N.Y. 1991) 3

Helm v. Louisville Two-Way Radio Corp., 667 S.W.2d 691 (Ky. 1984)..... 4, 10, 11

In re 960 Radio, Inc., FCC 85-578 (November 4, 1985), 1985 WL 193883 (1985)..... 5

In re Mobilecomm of New York, Inc., 2 F.C.C.R. 5519 (Common Carrier Bureau 1987)..... 5

TABLE OF AUTHORITIES – Continued

Page

Monfort v. Larson, 693 N.Y.S.2d 286 (N.Y. App. Div. 1999), *leave to appeal dismissed*, 705 N.Y.S.2d 7 (N.Y. Jan. 6, 2000) 5

Printz v. United States, 521 U.S. 898 (1997)..... 12

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 1

Schroeder v. Municipal Court of Los Cerritos Judicial District, 73 Cal.App.3d 841, 141 Cal.Rptr. 85 (1977), *appeal dismissed*, 435 U.S. 990 (1978)..... 4

Smith v. Calvary Educ. Broadcasting, 783 S.W.2d 533 (Mo. App. 1990).....5, 10

Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners, 199 F.3d 1185 (10th Cir. 1999), *cert. denied*, 63 U.S.L.W. 3631 (5/30/2000) 3, 6, 13

Still v. Michaels, 791 F.Supp. 248 (D.Ariz. 1992)..... 3

Still v. Michaels, 803 P.2d 124 (Ariz. Ct. App. 1990), *review denied* (1991)..... 4

Winfield Village Cooperative v. Ruiz, 537 N.E.2d 331 (Ill. App.), *appeal denied*, 545 N.E.2d 135 (Ill. 1989)..... 4

STATUTES

47 U.S.C. § 302a(a)(1-2)..... 8

Communications Amendments Act of 1982, Joint Explanatory Statement of the Committee of Conference, 1982 U.S.C.C.A.N. 2261, 1982 WL 25053 (Legis. Hist.)..... 9

Federal Communications Act of 1934 (47 U.S.C. §§ 151 *et seq.*) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

RULES

Sup. Ct. R. 10(a) 1

Sup. Ct. R. 10(c) 1, 2, 11

CONSTITUTIONAL PROVISIONS

U.S. Const., Article VI, clause 2 7

The Tenth Amendment to the United States Constitution 2, 7, 11, 12, 13, 14

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. There Is No Compelling Reason For The Court To Grant The Writ.

The Petition presents no issue worthy of this Court's attention and the relief sought should be denied. This case merely follows the well-established proposition that a local or state authority is preempted from regulating RFI because only the Federal Communications Commission (the "FCC") can regulate RFI. Pet. App. A at 2a-3a. This ruling does not conflict with the decision of another United States court of appeals. In fact, all of the circuit courts, all of the district courts, all of the state courts of last resort, and all of the FCC decisions on this issue have unanimously ruled that the FCC has exclusive jurisdiction over RFI. *See* discussion at Section I *infra* and Supreme Court Rule 10(a).

Finding no split of authority on this issue, the Petitioners hurriedly cobble together an argument that the Second Circuit's decision somehow conflicts with the Tenth Amendment and with relevant decisions of this Court concerning preemption. *See* Petition at 5, *et seq*. The Petitioners' desperate claims are for naught. *See* Supreme Court Rule 10(c).

The Second Circuit correctly held that federal law has preempted the field of RFI regulation and that state law is preempted when the "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Graeme Freeman, et al. v. Burlington Broadcasters, Inc. d/b/a WIZN, et al.*, Pet. App. A at 16a, *quoting, Rice v. Santa Fe Elevator*

Corp., 331 U.S. 218, 230 (1947). The Second Circuit's decision on preemption is in full compliance with this Court's precedents and the Tenth Amendment and is unassailable in this appeal. *See* Sup. Ct. Rule 10(c).

Finally, the Petitioners trumpet this case as worthy of certiorari because it is "of significant national importance." Pet. at 5. Such verbal posturing does not make it so. In truth, the issue involved in this case is a fairly pedestrian example of local and state authorities being preempted from acting in a field that is totally occupied by a federal instrumentality, the FCC. The Petitioners' attempts to elevate and change the meaning of this case are unavailing. There is simply no compelling reason for granting the Petition and it must be denied.

I. THE CASES CONCERNING THE FCC'S EXCLUSIVE JURISDICTION OVER RFI ARE NOT IN CONFLICT.

Although the Petitioners labor mightily to twist and bend the precedents in this area, the unalterable fact remains that all of the courts and tribunals that have faced this issue have agreed that the FCC has exclusive jurisdiction over the regulation of RFI. Instead of a split of authority, there is remarkable agreement that state and local authorities are preempted from regulating RFI, as shown in the following cases.

A. United States Court of Appeals.

Three United States courts of appeals have dealt with the precise issue involved in this case. The Second Circuit

decided the case that is the subject of this Petition: *Graeme Freeman, et al. v. Burlington Broadcasters, Inc. d/b/a WIZN, et al.*, 204 F.3d 311 (2d Cir. 2000) (Pet. App. A at 1a) ("For the reasons below, we conclude that federal law has preempted the field of RF interference regulation." Pet. App. A at 16a.) The United States Court of Appeals for the Tenth Circuit decided *Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners,* 199 F.3d 1185 (10th Cir. 1999), *cert. denied,* 63 U.S.L.W. 3631 (5/30/2000) (Congress intended federal regulation of RFI issues to be so pervasive as to occupy the field.) Finally, there is *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir. 1994), *cert. denied,* 511 U.S. 1128 (1994) (The FCC's jurisdiction over technical matters associated with the transmission of radio signals is clearly exclusive. Plaintiffs' action for nuisance against radio station was preempted by the Federal Communications Act.)

All three circuit courts that have faced the issue presented by the Petition have unanimously decided that only the FCC may regulate RFI. There are no conflicts on this issue and no compelling reason for granting this Petition. *See* Supreme Court Rule 10(a).

B. United States District Courts.

This same harmony exists at the district court level. *See Still v. Michaels,* 791 F.Supp. 248 (D.Ariz. 1992) (Federal court lacks subject matter jurisdiction of RFI nuisance case, action is preempted by Federal Communications Act.); *Great Lakes Wireless Talking Machine Company d/b/a WZSH 95 FM v. David Hayes, et al.*, CIV-91-6140T (W.D.

N.Y. 1991) (Operators of FCC-licensed transmitters answer only to FCC regarding RFI matters.)

C. State Courts.

State courts have also unanimously decided that only the FCC may regulate RFI.[1] *See, e.g., Still v. Michaels*, 803 P.2d 124 (Ariz. Ct. App. 1990), *review denied* (1991) (The FCC has exclusive jurisdiction over the resolution of RFI matters. Plaintiffs' action of nuisance is dismissed.); *Schroeder v. Municipal Court of Los Cerritos Judicial District*, 73 Cal.App.3d 841, 141 Cal.Rptr. 85, 87 (1977), *appeal dismissed*, 435 U.S. 990 (1978) (Unquestionably, federal legislation has preempted local regulation of radio transmission, including assignment of frequencies, and interference phenomena.); *Helm v. Louisville Two-Way Radio Corp.*, 667 S.W.2d 691 (Ky. 1984) (To control, regulate, or prohibit radio transmissions of a station licensed by the Federal Communications Commission is beyond the jurisdiction of a state court. *Id.* at 693.); *Blackburn v. Doubleday Broadcasting Co.*, 353 N.W.2d 550 (Minn. 1984) (Gravamen of plaintiffs' complaint is that defendant's signals prevent them from clearly receiving other desired signals. Dismissal of plaintiffs' case affirmed as Congress intended to

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[1] In *Winfield Village Cooperative v. Ruiz*, 537 N.E.2d 331 (Ill. App.), *appeal denied*, 545 N.E.2d 135 (Ill. 1989), an Illinois state court allowed a landlord to maintain an eviction action against a tenant/amateur radio operator who caused RFI. *Winfield Village* is off point since it deals with a breach of contract action in state court rather than the authority of a local zoning board to regulate RFI. That said, *Winfield Village* is wrongly decided and doesn't appear to have been followed by any court.

exercise exclusive jurisdiction over regulatory interference between radio stations.); *Smith v. Calvary Educ. Broadcasting*, 783 S.W.2d 533 (Mo. App. 1990) (Property owners' action against federally licensed radio station for interference of electrical and electronic appliances is preempted by the Federal Communications Act.); *Monfort v. Larson*, 693 N.Y.S.2d 286, 289 (N.Y. App. Div. 1999), *leave to appeal dismissed*, 705 N.Y.S.2d 7 (N.Y. Jan. 6, 2000); *Fetterman v. Green*, 455 Pa.Super. 639, 689 A.2d 289, *appeal denied*, 695 A.2d 786 (June 17, 1997) (The Federal Communications Act has preempted common law claims based upon radio frequency interference, thus divesting state courts of subject matter jurisdiction to entertain their claims.); *cf. Goforth v. Smith*, 991 S.W.2d 579, 583-84 (Ark. 1999) (state law action to remedy environmental effects of RF emissions preempted).

D. Federal Communications Commission.

Finally, the FCC has also ruled on the issue before the Court. *See In re Mobilecomm of New York, Inc.*, 2 F.C.C.R. 5519 (Common Carrier Bureau 1987) (Local zoning regulations are preempted, the Communications Act of 1934 and the Commission's implementing regulations have preempted state and local regulation of the radio frequency interference at issue in this case.); *In re 960 Radio, Inc.*, FCC 85-578 (November 4, 1985), 1985 WL 193883 (1985) (The FCC found that the "federal power in the area of radio frequency interference is exclusive; to the extent that any state or local government attempts to regulate in this area, their regulations are preempted.")

It should be stressed that the FCC's explicit statement on preemption of local regulation of RFI is dispositive on the issue of implicit intent to preempt. *Graeme Freeman, et al. v. Burlington Broadcasters, Inc. d/b/a WIZN, et al.*, Pet. App. A at 20a-21a, *citing, Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("An agency's interpretation of an ambiguous statute it is charged with administering is entitled to *Chevron* deference not only when the agency interprets through rulemaking, but also when it interprets through adjudication.") (citation omitted).

In sum, the cases in this area belie Petitioners' representation that this issue "is one of first impression for this Court,[2] and is of significant national importance." Pet. at 5. There is virtual unanimity among the federal and state courts that only the FCC may regulate RFI. Far from being a matter of national importance, this case presents a tired rehash of an argument that was put to rest years ago. The Petition should be denied.

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[2] The issue presented in the Petition is also *not* one of first impression for this Court, as represented by Petitioners. Pet. at 5. This Court has twice considered and twice denied petitions for certiorari on the very issue involved in this case. *See Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners*, 199 F.3d 1185 (10th Cir. 1999), *cert. denied*, 63 U.S.L.W. 3631 (5/30/2000); and *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir. 1994), *cert. denied*, 511 U.S. 1128 (1994).

II. THIS CASE DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

The Petitioners seem desperate to concoct an argument that will allow them to better position their Petition for certiorari. This is evident in Petitioners' next claim that the Second Circuit's decision is inconsistent with this Court's preemption standards (Pet. at 6-9) and that the decision is inconsistent with the Tenth Amendment (Pet. at 10-27). Both arguments are woefully weak and easily countered.

A. This Case Is In Accord With This Court's Standards For Preemption.

This Court has indicated that the Supremacy Clause of the Constitution, U.S. Const., art. VI, cl. 2, authorizes the federal government to preempt state laws to the extent necessary to achieve its purposes. *City of New York v. FCC*, 486 U.S. 57, 63 (1988). Congressional intent is the "ultimate touchstone" of preemption analysis. *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

In deciding this case, the Second Circuit recognized that the Federal Communications Act of 1934 ("FCA") does not contain an express intent to preempt state law from regulating RFI. Pet. App. A at 16a. However, the court recognized that the legislative history and the cases in this area show that Congress has authorized the FCC to exercise exclusive jurisdiction over the entire field of regulation of RFI (so-called "field preemption"). The

opinion below scrupulously followed this Court's precedents and determined that federal law has indeed preempted the field of RF interference regulation. Pet. App. A at 16a. The Second Circuit based its conclusion on the FCC's statutory authority to regulate RFI (Pet. App. A at 17a), the FCC's regulation of RFI through rule-making (Pet. App. A at 19a), and the FCC's own administrative decisions on preemption of local regulation of RFI (Pet. App. A at 21a-22a).

The opinion below is correct and thorough and in full accord with the relevant decisions of this Court on preemption of state action.

1. Field Preemption Of RFI Is Total And Includes Business Equipment.

Undaunted by the facts and the unanimous precedent in this area, the Petitioners' argument continues apace. The Petitioners concede that while the FCC may have express authority to regulate RFI to consumer equipment, the FCC has no authority to regulate interference to business and institutional equipment. Pet. at 18, 22. The Petitioners contend that in 1982 the Congress amended the FCA and established minimum electronic standards for home electronic equipment and systems at 47 U.S.C. § 302a(a)(1-2). Congress did not set similar standards for institutional or business equipment. Therefore, the Petitioners state that except with respect to devices which are capable of emitting harmful interference, "business electronic equipment remains untouched by federal law. 47 U.S.C. § 302a." Pet. at 23.

The Petitioners' argument is totally devoid of merit. In 1982, Congress amended the FCA to enable the FCC to regulate devices susceptible to **receiving** RFI. The legislative history of the 1982 amendments shows that Congress decided not to establish technical rules for commercial devices because such devices were generally not susceptible to RFI and did not need to be regulated. However, Congress found that many consumer electronic devices were of inferior quality and the manufacturers were not voluntarily building their equipment to reject RFI. Therefore, Congress broadened the FCC's authority and allowed it to regulate such consumer devices. *See* Communications Amendments Act of 1982, *Joint Explanatory Statement of the Committee of Conference*, 1982 U.S.C.C.A.N. 2261, 1982 WL 25053 (Legis. Hist.) (the "1982 Committee Report") (Pet. App. AA at 191a, *et seq.*)

Even though it decided to regulate only consumer devices, Congress stated the obvious:

> Moreover, by virtue of this section, the conferees wishes [*sic]* to clarify that the exclusive jurisdiction over RFI incidents (including pre-emption of state and local regulation of such phenomena) lies with the FCC.

The 1982 Committee Report, Pet. App. AA at 207a.

The Second Circuit correctly recognized the folly of Petitioners' "business equipment" argument and rejected it. Pet. App. A at 22a.

2. The Cases Confirm That Federal Preemption Of RFI Extends To Business And Institutional Equipment.

The Petitioners seek to bolster their "business equipment" argument by stating that the cases upon which the Second Circuit relied "do not address interference to business and institutional equipment." Pet. at 22. This is an extraordinarily disingenuous statement. The Petitioners are fully aware of several cases relied upon by the Second Circuit which deal with the preemption of local or state regulation over RFI which affects business equipment.

For example, in *Smith v. Calvary Educ. Broadcasting*, 783 S.W.2d 533 (Mo. Ct. App. 1990), property owners brought an action against a federally-licensed radio station alleging interference in the use of "electrical and electronic appliances located in plaintiffs' homes or **businesses**." *Id.* at 533 (emphasis supplied). Since the regulation of RFI is precisely the subject matter which lies within the exclusive regulatory jurisdiction of the FCC, the Missouri Court of Appeals affirmed the trial court's determination that it lacked subject matter jurisdiction over the plaintiffs' claim. *Smith*, 783 S.W.2d at 537.

See also Helm v. Louisville Two-Way Radio Corp., 667 S.W.2d 691 (Ky. 1984) for another state RFI regulation case concerning business equipment. In *Helm*, the Jefferson County Police Chief brought an action against the defendant seeking injunctive relief for interference with police broadcasts. The Chief claimed defendant's interference with police transmissions placed the life and safety

of his officers in jeopardy, and prevented calls for assistance from being transmitted. *Helm*, 667 S.W.2d at 692.

The lower court dismissed the Chief's case for lack of subject matter jurisdiction because "the state has no authority to exercise jurisdiction" over frequency interference cases. *Helm*, 667 S.W.2d at 692.

On appeal, the Supreme Court of Kentucky affirmed and held:

> To control, regulate, or prohibit radio transmissions of a station licensed by the Federal Communications Commission is beyond the jurisdiction of a state court.

Helm, 667 S.W.2d at 693.

Contrary to the Petitioners' representation, there are a number of judicial decisions in this area which have held that states and local governments are preempted from regulating RFI in any form, including RFI which affects business equipment. The Second Circuit properly decided this case and it is Petitioners' argument, not the decision below, that conflicts with relevant decisions of this Court. *See* Supreme Court Rule 10(c).

B. The Tenth Amendment Does Not Bar Field Preemption.

The Petitioners finally claim that the Second Circuit's decision is somehow inconsistent with the Tenth Amendment to the United States Constitution. Pet. at 10, *et seq.* The Petitioners appear to argue that all types of implied preemption of state control, including field preemption, are banned by the Tenth Amendment. The Petitioners'

rationale for their theory is somewhat cryptic: The Petitioners conclude that the zoning laws of the "small Vermont town of Charlotte are the authority that rules this application," because Congress failed to affirmatively act to preempt state regulation of RFI so the parties "drop into the safety net of the Tenth Amendment." *See* Pet. at 10, 12.

This, of course, has never been the rule of this Court and the substance of Petitioners' Tenth Amendment argument is wrong. Implied federal preemption of state action is widely recognized by this Court. *See, e.g., Printz v. United States*, 521 U.S. 898, 919 (1997) (The Tenth Amendment expressly confirms the residual state sovereignty implicit in "the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones. . . . ")

This Court recently reaffirmed the vitality of the field preemption doctrine in *Crosby v. National Foreign Trade Council*, No. 99-474, 2000 WL 775550 (U.S. June 19, 2000):

> A fundamental principle of the Constitution is that Congress has the power to preempt state law. Even without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances. **When Congress intends federal law to "occupy the field," state law in that area is preempted.** And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.

Crosby v. National Foreign Trade Council, No. 99-474, 2000 WL 775550 (U.S. June 19, 2000) at 6 (citations omitted) (emphasis supplied).

The Petitioners' argument that implied preemption of local regulation of RFI somehow runs afoul of the Tenth Amendment was recently raised and resoundingly rejected in *Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners*, 199 F.3d 1185 (10th Cir. 1999), *cert. denied*, 63 U.S.L.W. 3631 (5/30/2000). In *Southwestern Bell*, the County Commissioners also claimed that preemption of RFI violates the Tenth Amendment and federalism principles because zoning and public safety are traditional powers reserved to the states. *See Southwestern Bell*, 199 F.3d at 1193.

The Tenth Circuit in *Southwestern Bell* had little trouble decisively rejecting this Tenth Amendment argument by noting that the Supreme Court has ruled that preemption principles apply even to a matter of special concern to the states. *Id.* at 1194, *quoting*, *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982). The *Southwestern* court also stated that RFI regulation is not a traditional local interest, but a national interest preempted by federal legislation. If localities were allowed to have patchwork regulation across the country, the *Southwestern Bell* court reasoned, this would prevent a functional national telecommunications network. Therefore, the court held that federal preemption of RFI regulation does not violate the Tenth Amendment. *See Southwestern Bell, id.* at 1194.

The Petitioners' Tenth Amendment argument is weak, illogical and contrary to this Court's precedents. The Petition must be denied.

CONCLUSION

For all the reasons set forth above, Respondent Burlington Broadcasters, Inc. d/b/a WIZN requests the Court to deny the Petition for a writ of certiorari.

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